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No. 08-1123

IN THE

Supreme Court of the United States

CHEVRONTEXACO CORPORATION AND
TEXACO PETROLEUM COMPANY,

Petitioners,

v.

REPUBLIC OF ECUADOR AND PETROECUADOR,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY FOR PETITIONERS

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REPLY FOR PETITIONERS

The petition identifies a circuit split on an important question: Whether federal common law binds a government entity to an arbitration provision in a commercial joint venture's operating agreement where the government entity steps into the shoes of a private party in the venture and takes direct and substantial benefits under the agreement. The government entity *is* bound to arbitrate in the Federal Circuit yet is *not* bound to arbitrate in the Second Circuit.

The fact that the Federal Circuit case involved the U.S. Government, while the decision below involved a foreign government, was affirmatively noted in the petition to underscore the absurdity of having the U.S. Government be the *only* government bound by its conduct. Yet respondents' brief *embraces* this double standard as distinguishing the law in the Federal and Second Circuits. Without citing any authority, respondents advocate immunizing foreign governments—but not the U.S. Government—from the federal common law rules for binding nonsignatories to contractual arbitration clauses through assumption and estoppel. To be bound by an arbitration clause, respondents argue, a foreign government must not only sign the contract but also fulfill any special requirements for government contracting under local law.

Neither Federal Circuit law nor Second Circuit law draws such a distinction between domestic and foreign governments. And respondents provide no reason why federal common law should be bifurcated to allow foreign governments, but not the U.S. Government, to use government contracting rules to

avoid the obligations of agreements under which they have operated and taken benefits. Respondents' position reinforces the need for this Court's guidance on the proper application of federal common law to government entities—both domestic and foreign—in this era of increasing public-private commercial ventures.

Unable to refute the existence of the circuit conflict, respondents devote half of their opposition to a factual counter-statement, claiming the case is a poor vehicle because, at the very outset of the relationship, there was uncertainty whether Petroecuador was bound by the 1965 Joint Operating Agreement ("JOA"). But both Texaco Petroleum Company ("TexPet") and Petroecuador adhered to the JOA throughout the Consortium, and, when an anticipated new joint operating agreement did not materialize, TexPet reasonably understood that the JOA would continue to govern the operations of the parties' commercial venture. The only alternative scenario—that *no* operating agreement governed the massive oil operation co-owned by the parties for seventeen years—is both facially implausible and contradicted by the evidence. Indeed, respondents nowhere dispute that they took direct and substantial benefits under the JOA—the same contract that they now disavow.

I. RESPONDENTS CANNOT AVOID THE CONFLICT WITH *HARDIE* AND WITH SETTLED PRINCIPLES OF ASSUMPTION AND ESTOPPEL

Respondents fail to distinguish *Hardie v. United States*, 367 F.3d 1288 (Fed. Cir. 2004), which enforced an arbitration clause against the U.S. Government based on conduct remarkably similar to Petroecuador's conduct here. In both cases, a government took a share of a commercial joint venture previously formed by private parties, operated for years under the original joint-venture agreement, and then denied any obligations (including the obligation to arbitrate disputes) under the agreement. Pet. 11-15.

The only factual difference alleged by respondents is that Petroecuador purchased its joint-venture interest whereas the Government in *Hardie* obtained its interest through forfeiture. Opp. 25. But the Federal Circuit stated that the case for binding the Government to the joint-venture agreement would have been equally strong if one of the original parties "had simply sold its interest in the ... joint venture outright to the United States." *Hardie v. United States*, 19 F. App'x 899, 905 (Fed. Cir. 2001). Thus, it made no "difference that the United States happened to obtain its 'interest' ... through forfeiture, as opposed to any other means." *Id.*

Unable to distinguish *Hardie* factually, respondents revert to the merits of their position, arguing that there could be no valid consent to the JOA absent compliance with special rules for government contracts. But this is nonresponsive. The issue is whether these Ecuadorian law defenses

are even relevant in light of Petroecuador's conduct under the JOA. Under Second Circuit law, special rules for government contracts are *dispositive*: If such rules prevent enforcement of a contract *qua* contract—indeed, if there merely is uncertainty on this score—then there can be no reasonable reliance and the government cannot be held to the contract. Pet. App. 18a-19a. Under Federal Circuit law, by contrast, the same government contracting rules are *irrelevant*: The government "assume[s] the obligations of [an] original party" when the government acquires that party's interest and continues to conduct business under the contract, *regardless* whether special government contracting rules are satisfied. 367 F.3d at 1289-91. Respondents do not dispute the soundness of the Federal Circuit's holding, or the underlying principle that government entities may be treated like private parties in a variety of circumstances, including with respect to the application of equitable doctrines. Pet. 17-18; *see also Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 95-96 (1990) ("[T]he same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States."); *Simon v. Rep. of Iraq*, 529 F.3d 1187, 1195 (D.C. Cir. 2008) (holding that common law principles of equitable tolling also apply to suits against foreign governments), *rev'd on other grounds sub nom. Rep. of Iraq v. Beaty*, Nos. 07-1090, 08-539 (U.S. June 8, 2009); *cf. Beaty*, slip op. at 16 (noting that equitable tolling would have applied to suit against foreign government if jurisdiction had existed). Yet respondents fail to address this circuit conflict at all.

In particular, notwithstanding respondents' vague assertion that "the domestic laws to which the federal Government is subject are quite different from the foreign laws to which the Ecuadorian government ... is subject" (Opp. 24-25), they identify no pertinent difference between the government contracting rules that they invoke and those that the Government invoked in *Hardie*. The Government resisted enforcement of the contract in *Hardie* just as respondents do here, arguing that strict compliance with government contracting rules was required to waive its sovereign immunity. *See* Petition For Rehearing *En Banc* at 14, 2004 WL 3769713 (arguing that court could not "*imply* a waiver of sovereign immunity" and that contract was invalid because of noncompliance with statutory requirement that there "be a ceiling in any arbitration agreement"); Supplemental Brief at 7, 2003 WL 24305640 ("Plaintiffs' demand for binding AAA arbitration is in direct conflict with the statutory limitations upon the use of binding arbitration by Federal agencies."). Accordingly, if the JOA were somehow an "*illegal agreement*, void *ab initio*" (Opp. 23), it was no more "illegal" than the agreement upheld in *Hardie*.[1] And if Petroecuador's noncompliance with government contracting requirements established "the absence of any intent to contract" (Opp. 21), then such intent was equally absent in *Hardie*. Without a doubt, even if the Government in *Hardie* had invoked the same contracting rules that respondents invoke here, the

[1] Contrary to respondents' suggestion, the district court did not decide whether the Ecuadorian legal requirements invoked by respondents actually applied to contracts like the JOA. The court concluded only that Ecuadorian law on these matters was "unsettled in 1974." Pet. App. 18a.

Federal Circuit still would have held that the Government was bound to arbitrate because its conduct rendered those rules irrelevant.

Respondents' proposed distinction between contracting defenses under U.S. and foreign law would also eliminate the uniformity and clarity provided by federal common law. Although respondents misleadingly indicate that this dispute was resolved under "binding Ecuadorian law" (Opp. 17), the fact is that federal common law was applied—at the urging of *respondents*—to avoid the confusion and inconsistency that would result from applying different rules to different governments. Pet. App. 14a, 71a n.15, 79a. To the extent respondents now seek to override federal common law and use Ecuadorian law to exempt Petroecuador from assumption and estoppel, the argument is forfeited. *See Sprietsma v. Mercury Marine*, 537 U.S. 51, 56 n.4 (2002).

Respondents are thus left with the bare fact that *Hardie* involved the U.S. Government as opposed to the Ecuadorian Government. Opp. 24-25. Although that distinction—readily acknowledged in the petition (pp. 15-16, 24)—may explain why one case was filed in the Federal Circuit and the other in the Second Circuit, it does not explain the different results. Respondents provide no basis—and there is none—for a distinction under which foreign governments can use government contracting rules to avoid the application of assumption and estoppel while the U.S. Government cannot. Furthermore, there is no indication that *Hardie* would have turned out differently had it involved the Ecuadorian Government, or that this case would have turned out

differently below had it involved the U.S. Government. And even if Second Circuit law embraces a *sub silentio* distinction between foreign and domestic government entities, the result—that ours is the only government on the planet subject to assumption and estoppel—further strengthens the case for review.

Respondents' other attempts to avoid the conflict with *Hardie* are unavailing:

First, the conflict is not alleviated by the fact that assumption and estoppel are "'mesh[ed]'" under Second Circuit law as it now stands. Opp. 20 n.7 (quoting Pet. App. 14a).[2] Whereas the Second Circuit now makes estoppel's "reliance" requirement a necessary element of assumption as well, *Hardie* applied assumption with no such requirement. Respondents do not even attempt to defend the merging of assumption and estoppel in the Second Circuit, and, just this Term, this Court reiterated that they are distinct doctrines. *Arthur Andersen LLP v. Carlisle*, 129 S. Ct. 1896, 1902 (2009) (quoting 21 R. Lord, *Williston on Contracts* § 57:19, at 183 (4th ed. 2001)).

Second, the finding of no "actual" reliance—erroneously described by respondents as an "alternative ... holding"—is relevant only to the "estoppel theory" (Opp. 28) and does not affect assumption, which has no reliance requirement. This finding thus provides no basis for denying review of

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[2] Contrary to respondents' contention (Opp. 20 n.7), petitioners are not responsible for the erroneous meshing of the assumption and estoppel analyses. In both the district court and the Second Circuit, petitioners argued assumption as an independent basis for holding respondents to the JOA. (*E.g.*, A-1879-1900.)

the split with *Hardie*. Furthermore, despite respondents' effort to paint it as "fact-bound" (Opp. 28), the no-reliance finding rests on an important legal ruling that is plainly unsound.

The no-reliance finding was premised on the notion that, if a party *initially* is uncertain whether a nonsignatory is bound to a contract, then the nonsignatory's *subsequent* conduct indicating its acceptance of the contract is "irrelevant," and the nonsignatory *never* can be estopped from denying contractual obligations. Pet. App. 35a. This holding is untenable because, in all cases where a formal contract is absent, ambiguity may exist *before* a party engages in conduct that provides a basis for estoppel. Pet. 18-19. Properly understood, the issue is not whether one party believes that the other has no possible legal defenses, but whether it believes that the contract will be respected *notwithstanding* those defenses. *See, e.g., Wiggins Ferry Co. v. Ohio & Miss. Ry.*, 142 U.S. 396, 408-09 (1892) (although defendant was initially "at liberty to renounce" its predecessor's contract, it "sustained the same relation as had previously existed under the deed" and thus was "not ... permitted afterwards to repudiate any of its obligations"). The approach taken below eviscerates estoppel doctrine and heightens the need for review.

This case illustrates the capriciousness of this estoppel analysis. The evidence cited by the district court, and repeated in respondents' prolix background section (Opp. 4-13), establishes that, while the parties were unsuccessfully negotiating the terms of a new joint operating agreement, TexPet was aware that Petroecuador had not formally

adopted the JOA and complained about the *ad hoc* nature of the situation. Pet. App. 7a-9a, 31a-33a. But the evidence is clear that this uncertainty over the JOA did not extend beyond the early stages of the parties' relationship since, on the ground, Petroecuador was adhering to the JOA and continued to do so for *seventeen years*. Pet. 4-6. Importantly, respondents do not dispute the evidence that Petroecuador acknowledged and claimed the benefits of the JOA throughout the Consortium. They do not, for example, deny that Petroecuador "'refuse[d] to accept th[e] possibility'" that the JOA was not in force after it had invoked the contract's change-of-operator provision. Pet. 5-6 (quoting A-1392). To have conducted this major oil venture in a vacuum without reference to the terms of the JOA, furthermore, would have deviated sharply from standard industry practice. (A-2000-01.)

Respondents are thus reduced to arguing, without support, that the parties were "merely 'referen[cing]'" the JOA and did not consider it binding. Opp. 9. But the Government made the same argument in *Hardie*, to no avail. Petition for Panel Rehearing at 13-14, 2001 WL 34711631 ("[t]he fact that the United States ... looked to [the joint-venture] agreement[ ] to define the Government's interest ... does not suggest that ... [the] United States ... considered [itself] to be contractually bound"). Here, the "references" to the JOA signaled Petroecuador's adherence to the contract notwithstanding any legal defenses, and TexPet reasonably relied on those "references" in allowing Petroecuador to take the contract's benefits. Indeed, the district court previously viewed these "references" as sufficient to preclude summary judgment. Pet. App. 81a. A key component of the

question presented is whether the district court erred in later reversing course and deeming these "references" legally "irrelevant." Pet. App. 35a.

Third, the Second Circuit's use of the summary-order mechanism is not a basis for avoiding either the existence of a circuit split or the need for this Court's review. To be sure, binding Second Circuit law could not properly have been established in a summary order. Opp. 18-19. But respondents ignore that the summary order also could not properly have been issued unless it was "dictated by pre-existing precedent," such that the Second Circuit is not "free to rule differently in similar cases." Second Circuit Order (June 26, 2007) (adopting Local Rule 32.1), *available at* http://web.archive.org/web/20070722080857/www.ca2.uscourts.gov/Docs/Rules/Rule32.1.pdf (last visited June 8, 2009).[3] Regardless whether the law as it now stands in the Second Circuit was established in this case or a prior one, that law is both clear and in conflict with that of the Federal Circuit, and this Court should resolve the conflict.

II. THE ISSUE PRESENTED IS IMPORTANT AND TIMELY

The petition shows that the availability of neutral arbitral forums, particularly for investors having commercial dealings with government entities, is an

[3] The only other possibility is that the Second Circuit's affirmance is based *neither* upon Second Circuit law established in this case *nor* upon pre-existing precedent. The petition points out, and respondents nowhere dispute, that the courts below not only failed to address *Hardie* but also failed to identify binding precedent that might dictate a contrary outcome here. Pet. 19-20. A decision that admittedly lacks legal basis plainly would necessitate some form of corrective action by this Court. Pet. 21.

important issue. Pet. 21-23. This is underscored by the fact that many foreign courts, like those in Ecuador, are subject to political pressures and do not adhere to the rule of law. Pet. 22. The petition also shows that the specific issue presented here—concerning a government entity's obligations when it steps into the shoes of a private party in a commercial joint venture—is especially significant and timely given the stakes being assumed by governments around the world in private businesses affected by the ongoing economic crisis. Pet. 24.

Respondents neither dispute these points nor deny the general importance of the issue presented. The additional factors they cite in an attempt to lessen the importance of this case are unavailing.

Respondents note that there might be alternative venues for petitioners to seek indemnification from respondents for the proposed $27 *billion* Ecuadorian judgment against Chevron. Opp. 26-27. Relatedly, respondents emphasize that the permanent injunction of arbitration is interlocutory, in that petitioners have counterclaims for indemnification pending in the district court based on an environmental settlement agreement with respondents. Opp. 30-31. But these points are irrelevant. The right to pursue relief *in international commercial arbitration*, which is what petitioners seek here, has independent importance.

Respondents also assert that there is no "recurring fact pattern" because few cases will involve a "large multinational oil company ... engag[ing] a foreign sovereign in a contractual business relationship covering more than 17 years" without a signed contract. Opp. 27. As discussed, however, the issue

presented here is not limited to foreign governments, and *Hardie* and this case illustrate how the same issue can be presented with closely analogous facts but in very different contexts. *See also Bridas S.A.P.I.C. v. Gov't of Turkmenistan*, 345 F.3d 347 (5th Cir. 2003). Moreover, in suggesting that this issue should never arise because corporations with "sophisticated ... counsel" should *always* demand a signed agreement with a foreign government entity (Opp. 27), respondents are assuming that such corporations can *never* claim the benefit of either assumption or estoppel—which is precisely the question presented in this case.

CONCLUSION

For these reasons and those set forth in the petition, this petition should be granted.

Respectfully submitted,

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